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April 30, 2001

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**VIA COURIER**

Magalie R. Salas  
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Re: CC Docket No. 98-10, 1998 Biennial Regulatory Review —  
Review of Computer III and ONA Safeguards and Requirements

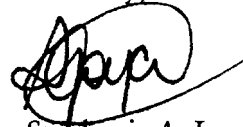
Dear Ms. Salas:

Enclosed for filing please find an original plus four (4) copies of the reply comments of the United States Internet Service Providers Alliance ("USISPA") in the above-captioned docket.

Also enclosed is one copy of the reply comments marked "Stamp In." Kindly stamp this document and return it to me in the self-addressed envelope enclosed.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,



Stephanie A. Joyce  
Associate

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Computer III Further Remand Proceedings:  
Bell Operating Company Provision of  
Advanced Services

# 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements

CC Docket No. 95-20

CC Docket No. 98-10

**REPLY COMMENTS OF THE  
UNITED STATES INTERNET SERVICE PROVIDERS ALLIANCE**

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## SUMMARY

The comments submitted in this phase of the Commission's review of *Computer III* present a clear picture of the ILECs' dominance over the local network and of their intransigence in comporting with any rules requiring them to open it. The ISP experience since 1995 has borne out exactly the scenario that the Commission prophesied when it first established structural separations rules in 1980: to permit those that control the local network to enter the enhanced services market is to create another telecommunications monopoly. The farther that the Commission has strayed from this basic precept, the more precarious the situation in this market has become. The time has come to return to basic principles, if only to save the competitive market for the players that survive and for the new entrants to come.

The refreshed record demonstrates that the Commission's market-opening requirements, those from both *Computer III* and from the 1996 Act, have failed to establish competition in the local market. This failure is a product of several factors, including inherent deficiencies in the rules. Of equal causative weight, however, is the ILECs' unwillingness or inability to comply with these rules. With the Commission's attention focused elsewhere (often on the defense of its procompetitive rules in federal court), an unfortunate pattern of noncompliance developed that has thwarted competitors for more than a decade. The result has been the bankruptcy of dozens of CLECs and ISPs, as well as the regrettable situation in which CLECs and ISPs can no longer work together to serve customers — a modern vestige of ancient divide-and-conquer warfare.

The logical response to this development is not, as the Commission has tentatively concluded, to abandon *Computer III* in favor of rosier deregulatory climes. Although nearly every competitor participating in this proceeding agrees that *Computer III* was unhelpful, these same commenters agree that new procompetitive rules are necessary and can truly benefit competition.

Among these suggested rules are renewed structural separation, enhancement upon the provisioning obligations of *Computer III* and, above all else, enforcement of existing local competition rules. Commission adoption of this new framework is vital at this time. As the record demonstrates, and USISPA reiterates, the Commission has the jurisdiction, the authority, and the ability to create this framework. To do otherwise would be a plain abandonment of the competitive principles that have guided the FCC for over two decades.

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company Provision of	)	
Advanced Services	)	
	)	
1998 Biennial Regulatory Review —	)	CC Docket No. 98-10
Review of Computer III and ONA	)	
Safeguards and Requirements	)	

REPLY COMMENTS OF THE  
UNITED STATES INTERNET SERVICE PROVIDERS ALLIANCE

The United States Internet Service Providers Alliance (“USISPA”), through its undersigned counsel, hereby provides reply comments in this proceeding to urge the Commission to reject its tentative conclusion that its *Computer III* network open access rules<sup>1</sup> may be repealed without harm to enhanced services competitors.<sup>2</sup> Having refreshed the record with multiple and severe instances of discrimination, the Commission should meet with suspicion the pleas for deregulation that the ILECs have propounded in this review of the *Computer III* rules.<sup>3</sup> Rather, the Commission should establish and impose a real open network regime, including measures for enforcement, as well as mandatory structural separation, in order to repair the damage already wrought upon competition and to revive the Internet access services market.

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<sup>1</sup> *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 30, 1998) (“*Computer III FNPRM*”).

<sup>2</sup> *Computer III FNPRM* ¶ 61. See also *id.* ¶¶ 85-88.

<sup>3</sup> Further Comments of SBC at 5-8; Further Comments of BellSouth at 2; Comments of Verizon at 3-7.

I. THE COMMISSION SHOULD NOT REWARD THE ILECs BY ABANDONING OPEN ACCESS RULES ALTOGETHER

That *Computer III* has not been a success is largely a matter of consensus among the competitive industry.<sup>4</sup> The industry's apprehension that ILECs will leverage their local network monopoly into the information services market<sup>5</sup> has become a documented reality.<sup>6</sup> Indicative of this development is the fact that 28 of the CLEC and ISP parties that participated in the 1998 phase of this proceeding have not filed comments to refresh the record in this phase; one wonders where these parties have gone. Given the state of competition as revealed in this proceeding, the Commission would betray the competitive principles that it has established if it were to relieve the ILECs of responsibilities that they have never satisfied. USISPA urges the Commission to give substantial weight to the evidence submitted in this proceeding and to hold fast to the tenets of its open network rules, improving them where experience has revealed their shortcomings.

A. The Record Demonstrates That The ILECs Have Not Complied With *Computer III*

Commenters in this phase of the proceeding have presented myriad examples of outright discrimination by the ILECs against their competitors. This discrimination may be categorized in

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<sup>4</sup> See generally Comments of Comments of the General Services Administration ("GSA"); AT&T Corp. (Apr. 16, 2001); Comments of eVoice; California Internet Service Providers Association ("CISPA") Comments; Comments of WorldCom; Comments of New Hampshire Internet Service Providers Association ("NHISPA"); Brand X Internet Comments; USISPA Comments; Comments of LowTech Designs. See also Comments of America Online, Inc. ("AOL") (Mar. 27, 1998); Comments of the Information Technology Association of America ("ITAA"); Comments of CompuServe Network Services; Joint Comments of APK Net *et al.*; Comments of LCI International Telecom Corp. *Contra* Comments of the American ISP Association ("AISPA") at 3-5 (Apr. 16, 2001); EarthLink at 7.

<sup>5</sup> Comments of AOL at 2-3 (Mar. 27, 2001); Comments of the Commercial Internet eXchange Association ("CIX") at 2 (Mar. 27, 2001).

<sup>6</sup> SBC has taken the overwhelming proportion of the DSL market in its region, estimated by some to be as high as "a 100% market share where it controls the last mile." Brand X Comments at 9. Commensurate with this share, SBC has raised its retail DSL price 25% to \$49.95 per month. WorldCom Comments at 4; CISPA Comments at 17.

three parts: anticompetitive pricing; faulty or failed element provisioning; and violations of *Computer III* reporting obligations.

The *Computer III* rules require that ILECs provide enhanced services to competitors at resale; resold service must not be priced to permit “improper cost-shifting to regulated operations and anti-competitive pricing in unregulated markets.”<sup>7</sup> The ILECs have indeed engaged in anticompetitive pricing in the unregulated DSL market. Several parties have brought out the ILECs’ apparent attempts to impose a price squeeze on DSL services. Verizon, BellSouth and, until recently, SBC have priced their retail DSL service at \$39.95, while offering DSL on a wholesale basis to ISPs at \$39.00.<sup>8</sup> Brand X Internet estimates that it loses \$34.05 per customer to resell SBC DSL service.<sup>9</sup> As to Verizon DSL, CISPA states that “[t]he choice is clear for ISPs in Verizon territory — sell DSL service for at least \$10-\$15 more than Verizon Online or decline to provide services[.]”<sup>10</sup> These comments are *prima facie* evidence that *Computer III* pricing rules have been violated.

Of course, the fundamental obligation of *Computer III* is that ILECs must provide, on a nondiscriminatory basis, “the basic services and basic service functions that underlie the carrier’s enhanced service offering.”<sup>11</sup> In addition, ILECs must provide “standardized hardware and software interfaces,” today known as operations support systems (“OSS”), that are “identical to those utilized in the enhanced service provided by the carrier.”<sup>12</sup> Yet the evidence reveals that

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<sup>7</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC.2d 958, 1040 (1986) (subsequent history omitted) (“*Phase I Order*”).

<sup>8</sup> CISPA Comments at 18; AISPA Comments at 7; Brand X Comments at 5-6. SBC has since raised its DSL retail price to \$49.95. WorldCom Comments at 4.

<sup>9</sup> Brand X Comments at 6.

<sup>10</sup> CISPA Comments at 18.

<sup>11</sup> *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, CCB Pol 96-09, Order, 11 FCC Rcd. 6919, 6924 (1996) (citing *Phase I Order*, 104 FCC.2d at 1040).

<sup>12</sup> *Phase I Order*, 104 FCC.2d at 1039.



ILEC provisioning of these elements to competitors has been slow, inadequate, and skewed in favor of ILEC affiliates. CISPA, a USISPA member organization, explains at length the problems it has experienced with ILEC discrimination in port allocation, port availability information, and ordering requirements.<sup>13</sup> CISPA also highlights what it perceives to be ILEC illicit joint marketing efforts between the parent and the DSL affiliate, and habitual DSL billing “mistakes” that have discredited CISPA members with their customers.<sup>14</sup> In addition, one voice mail competitor cites “numerous violations”<sup>15</sup> of the Commission’s 120-day ONA provisioning interval.<sup>16</sup>

Finally, several commenters have discussed the violations of *Computer III* nonstructural reporting safeguards that they have witnessed. eVoice states plainly that, in 1999, then-Bell Atlantic, Pacific Bell and Southwestern Bell submitted incomplete *Computer III* compliance reports, failing to denote SMDI and OSS provisioning failures.<sup>17</sup> Other possible violations occur in the area of abuse of customer proprietary network information (“CPNI”):<sup>18</sup> CISPA describes the process by which an ILEC cancels an ISP DSL order for lack of a DSLAM port, then takes the information provided in the ISP’s order, contacts the customer, and “encourages the customer not to use the competing ISP, and promises to contact the customer as soon as a port is available[.]”<sup>19</sup> Such conduct not only violates the basic tenets of open access, but also contravenes basic notions of fair play.

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<sup>13</sup> CISPA Comments at 11-15.

<sup>14</sup> *Id.* at 22-26.

<sup>15</sup> eVoice Comments at 15.

<sup>16</sup> *E.g., Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase I, 4 FCC Rcd. 1, ¶ 16 (1988).

<sup>17</sup> eVoice Comments at 18.

<sup>18</sup> The CPNI rules in *Computer II* and *III* have been modified by Section 222 of the 1996 Act. 47 U.S.C. § 222. The Commission’s rules implementing that section were vacated by the Tenth Circuit in *US West v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999).

<sup>19</sup> CISPA Comments at 25.

This synopsis reflects just a fraction of the incidents of the ILECs' failures to comply with *Computer III*. This evidence belies the ambitious statements that the record "contains no evidence that any LECs have inhibited the development of enhanced service markets or competition within those markets."<sup>20</sup> If that were so, competition in enhanced services, such as voice mail, would be evident.<sup>21</sup> If CEI/ONA works, the number of ISPs would not have been reduced by almost 2,000 at the close of 2000.<sup>22</sup> The structural problems that USISPA discussed in its initial comments have thus come home to roost.<sup>23</sup> As WorldCom succinctly states, "[e]ven if it was not clear then, it is clear now that ONA is an idea whose time never came."<sup>24</sup> The conclusion to be drawn is not, therefore, to abandon competitive network rules, as the ILECs suggest, but to create a regime for opening the network that is informed by past experience.

B. The Commission Must Recraft a Competitive Framework for Breaking Open the Network to Internet Access Competition

Realizing that *Computer III* was never successfully implemented, the Commission's next step should be to establish rules that work. USISPA has provided the Commission with several basic concepts to inform this process, including the reinstitution of a federal network element regime and increased enforcement of existing rules.<sup>25</sup> Several other parties have proposed more sophisticated, detailed rules, such as the "Market Enforcement Obligations" offered by EarthLink.<sup>26</sup> The Commission should use these suggestions, as well as its own expertise to create

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<sup>20</sup> Further Comments of BellSouth at 2. See also Further Comments of SBC at 4.

<sup>21</sup> eVoice states that, after almost 13 years of supposed competitive network access, ILECs hold over 90% of the voice mail market for both residential and business service. eVoice Comments at 10.

<sup>22</sup> Compare CIX Comments at 11 (stating that 5,700 – 6,500 ISPs operated in 1999) with Verizon Comments at 5 (noting that, of 5,000 ISPs operating today, none of the ten largest ISPs are ILEC affiliates).

<sup>23</sup> See USISPA Comments at 3-8.

<sup>24</sup> WorldCom Comments at 3.

<sup>25</sup> USISPA Comments at 12-14.

<sup>26</sup> EarthLink Comments at 8-20.

rules that will foster competitive entry and enhance the Internet access service market in the public interest.

## II. COMMENTERS AGREE THAT COMMISSION INVOLVEMENT AND ENFORCEMENT IS VITAL TO COMPETITION AT THIS TIME

The record in this phase demonstrates a sharp desire among the competitive industry that the Commission take decisive action at the close of its review in this proceeding. Specifically, parties request that the Commission revisit its *Computer I/II* separations rules as perhaps the only way to combat further capture of Internet access market share by the ILECs. In addition, several commenters urge the Commission to increase its energy and focus on enforcement of all of its market-opening rules in order to ensure, finally, that the ILECs comport with each of their obligations.

### A. Structural Separation Between ILEC Wholesale and Retail Services Is Required to Remedy the Pattern of Anticompetitive Discrimination

The need for structural separation is a resounding theme among the comments filed by ILEC competitors in this proceeding.<sup>27</sup> CompuServe wrote in 1998 that separation “is the only way to guard against anticompetitive practices.”<sup>28</sup> The GSA also stated then that “BOCs will almost always play a dual role,” as both the supplier to and competitor of local carriers, and that “structural separations provide the best way to ensure that the BOCs meet the demands of this dual role.”<sup>29</sup> These sentiments are underscored today by several parties, including CIX, CISPA, NHISPA and WorldCom. Only the ILECs oppose separation, and predictably so.

It cannot be seriously contended that the Commission is without the authority to reimpose structural separation on the ILECs. This measure was upheld by the D.C. Circuit in

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<sup>27</sup> AT&T Comments at 5-6; Brand X Comments at 11; WorldCom Comments at 8-9; CISPA at 30; CIX Comments at 12; USISPA Comments at 14; GSA Comments at 3-5.

1982<sup>30</sup> and nothing in the 1996 Act has diminished or superceded that ruling. Not even Section 706, which once was employed by the ILECs to urge the Commission not to apply Section 251 unbundling on DSL-related elements,<sup>31</sup> prohibits the Commission from imposing any regulatory scheme already developed for the purposes of developing local competition. Nor can Section 10, the forbearance provision created in the 1996 Act as a potential mechanism for deregulating a robust marketplace, be deemed an instrument of congressional pressure not to impose structural separation where necessary.<sup>32</sup> Market failures invite regulation; the evidence in this proceeding tends to a finding that failure in the Internet access market is possible, and even imminent.

In addition, notions that the imposition of structural separation, or any regulation, is inimical to a level playing field should not be accorded any weight by the Commission. BellSouth, SBC and Verizon each complain that, of all the media for providing Internet access, only DSL is regulated.<sup>33</sup> This premise is entirely false, on two levels. First, it is not end user DSL services that are focus of this inquiry, but the basic elements of the local network that enable DSL service. In addition, other forms of Internet access, such as cable modems or, as Verizon would have it, CMRS, are indeed regulated and face their own sets of entry requirements. Time Warner AOL, as a condition of merger approval, in fact signed the Senate's proffered

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<sup>28</sup> CompuServe Comments (Mar. 27, 1998) at 7.

<sup>29</sup> GSA Comments (Mar. 27, 1998) at 6.

<sup>30</sup> *Computer & Communications Ind. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

<sup>31</sup> *Commission Seeks Comment on Bell Atlantic Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11, Public Notice, 13 FCC Rcd. 2495 (1998); *Commission Seeks Comment on US West Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26, Public Notice, 13 FCC Rcd. 4739 (1998); *Commission Seeks Comment on Ameritech Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-32, Public Notice, 13 FCC Rcd. 4741 (1998). The Commission denied all petitions. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, FCC 98-188 (Aug. 7, 1998) ("*Advanced Services MO&O*").

<sup>32</sup> As the Commission recognizes, Section 10 forbids the Commission from imposing the mandates of Section 251 and 271 "until it determines that those requirements have been fully met." *Advanced Services MO&O* ¶ 72. Section 10 neither creates nor repeals any separate regulatory authority to the Commission. *Id.* ¶70.

Memorandum of Understanding that requires it to open its network to ISPs. Players in the wireless industry must comply with several construction and technical requirements, assuming that they meet the Commission's strict auction eligibility requirements and can win in the fierce competitive bidding process. Unlike these carriers, ILECs were given the local network in federal court; for years they enjoyed a captive rate base and governed the network in their own interests. Now that those interests are contravened by Congress's express mandates, Commission intervention is not only proper, but it is required.

Finally, the Commission should impose structural separation obligations that force ILEC wholesale and retail entities to remain truly separate. As a few commenters have noted, ILEC telephony and DSL entities often operate as one, sharing the same personnel, billing, and offices.<sup>34</sup> EarthLink's comments show, perhaps unwittingly, that SBC and its data affiliate share the same website.<sup>35</sup> To prevent this kind of soft integration, the Commission should rely upon its earlier *Computer I* separations framework. This framework remains valid as a matter of law and of policy, despite the Commission's decision to sunset Congress's Section 272 mandates effective February 2000.<sup>36</sup> Only absolute separation, coupled with a commitment to enforcement, can revive Internet access competition at this time.

#### B. The Commission Must Enforce Section 251 Vigilantly

Section 251, despite its flaws and ambiguities, remains this Commission's best tool for fostering competition in Internet access services. Through Section 251, the Commission has

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<sup>33</sup> Further Comments of BellSouth at 6; Verizon Comments at 7-9; Further Comments of SBC at 9.

<sup>34</sup> Brand X Comments at 8-9.

<sup>35</sup> EarthLink Comments at 12 n.23 (*citing* ASI Terms and Conditions of DSL Service to ISPs, available at <[www.pacbell.com](http://www.pacbell.com)>).

<sup>36</sup> See *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, CC Docket No. 96-149, Order (rel Feb. 4, 2000).

adopted procompetitive rules, including mandates for cageless collocation, line sharing and nondiscriminatory spectrum management, that were a boon to CLECs in their race to the customer. These rules, however, are of no consequence whatever unless the Commission puts its authoritative might into requiring ILECs to follow them.

The lackluster success of Section 251 has had a further debilitating effect on the Internet access market, in that ISPs have become leary of relying on CLECs to serve customers.<sup>37</sup> This situation arises from the inability of CLECs to obtain crucial network elements in a timely or reliable manner from the incumbents. ISPs have been forced to go elsewhere — often to the same offending ILEC — to receive DSL service, ultimately resulting in the downfall of several data CLECs, whom WorldCom describes as “perhaps the best hope for the emergence of a competitive DSL market.”<sup>38</sup> This effect must be remedied by the Commission in order that CLECs and ISPs can again work together to reach customers that would otherwise go unserved — or served at higher prices — by the incipient DSL-ISP conglomerates of the ILECs.

The Commission has the authority, the expertise, and the talent to effect ILEC compliance. As USISPA stated in its initial comments,<sup>39</sup> the Communications Act expressly empowers the Commission to investigate carrier conduct and to punish those that ignore or circumvent its rules. Indeed, the Commission has collected millions of dollars in fines in its vehement pursuit of slammers that betray the public trust. The ILECs’ continued failure to comport with Congress’s Section 251 mandates surely warrants similar commitment and is as vital to consumer protection as anti-slamming measures.

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<sup>37</sup> NHISPA Comments at 8 ¶ 33; Helicon Online Comments (Mar. 27, 1998) at 4.

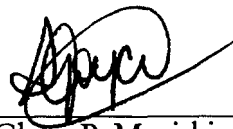
<sup>38</sup> WorldCom Comments at 8.

<sup>39</sup> USISPA Comments at 13 & n.50.

### CONCLUSION

For all these reasons, USISPA recommends that the Commission decline to rely upon the *Computer III* ONA/CEI model for attaining competitive network access, and instead adopt a new model of unbundling, including wholesale-retail structural separation and enforcement, to ensure that the local network can finally be open to true competition.

Respectfully submitted,

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Dated: April 30, 2001

## CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of April, 2001, that a copy of the foregoing document was served by messenger (\*) or by first class mail, postage prepaid to the following parties:

  
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